6-1-2004

Taking a Step Back: The United States Supreme Court's Ruling in Overton v. Bazzetta

Marsha M. Yasuda

TAKING A STEP BACK: THE UNITED STATES SUPREME COURT'S RULING IN *OVERTON V. BAZZETTA*[1]

I. INTRODUCTION

Stacy Barker, a prisoner of the Michigan Department of Corrections (MDOC), lost all rights to receive visits from her 11-year old daughter when she was caught committing her second drug violation: possession of "a single Motrin pill and an expired prescription."[2] A federal judge eventually reinstated Barker's right to receive visits from her daughter,[3] but the United States Supreme Court upheld the underlying regulation that punished Barker in the first place. In *Overton v. Bazzetta*,[4] the Court held prison officials possess the power to adopt regulations severely constraining inmate visitation rights. The Court reasoned such restrictions were necessary to maintain order in overcrowded prisons;[5] this decision, however, will only exacerbate the problem.

Studies show visits by family and friends reduce the recidivism rates of prisoners and also encourage them to become better citizens once they are freed from jail.[6] Visitation rights may therefore

---

1. 539 U.S. 126 (2003).

2. David Shepardson, *Prison Visitation Rules Criticized; Rehabilitation Suffers Under State's Security Concerns, Critics Say*, DETROIT NEWS, June 17, 2001, at 1C; *see also* HUMAN RIGHTS WATCH, NOWHERE TO HIDE: RETALIATION AGAINST WOMEN INCARCERATED IN MICHIGAN STATE PRISONS (1998), *available at* http://www.hrw.org/reports98/women/Mich-04.htm#P279_63986 (last visited Apr. 10, 2004) (providing evidence that Ms. Barker was "set up" by prison officers in retaliation for her involvement in successful litigation against the Michigan Department of Corrections).

3. L.L. Brasier, *Prison Hero Gets a New Day in Court*, DETROIT FREE PRESS, *available at* http://www.freep.com/news/locoak/stacy9_20010809.htm (Aug. 9, 2001).

4. 539 U.S. 126 (2003).

5. *Id.* at 129.

6. MODEL SENTENCING AND CORR. ACT § 4-115 cmt., 10 U.L.A. 470 (2001).

ultimately decrease the prison population because regular visitation reduces recidivism rates.[7] Also, while prisons may have a penological interest in restricting prisoners' visitation rights, such an interest should not undermine one of the very reasons for prisons: rehabilitation.[8]

This Case Comment begins in Part II by briefly outlining the history of prisoners' rights and rehabilitation as an acceptable theory of punishment for prisoners. Part III summarizes the United States Supreme Court's decision in *Overton* and its rationale. Part IV analyzes the Court's decision and argues the Court erred in applying the four factors of the *Turner v. Safley*[9] test, which determines whether a regulation withstands a constitutional challenge. Finally, Part V concludes the decision in *Overton* does not further the goal of maintaining order in overcrowded prisons since the lack of visitation may increase recidivism rates, thereby preserving or increasing present prison populations and exacerbating overcrowding.

II. BACKGROUND

A. The 1960s Expansion of Prisoners' Rights and Rehabilitation as an Acceptable Theory of Punishment

Prior to the 1960s, courts applied the "hands off" doctrine to prisoners' rights.[10] Using this approach, courts abstained from even recognizing issues regarding prisoners' rights.[11] Starting in the late 1960s, however, and continuing through the 1970s, courts no longer

---

7. *See* Suzanne Carol Schuelke, *Prisons and Corrections: Prison Visitation and Family Values*, 77 MICH. B.J. 160, 160 (1998) ("Research on the subject [of visitation rights] overwhelmingly shows that visits have a positive correlation with the chance of parole success.").

8. "The literature devoted to theories of punishment identifies four primary justifications for punishment: incapacitation, deterrence, rehabilitation, and retribution." Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1154 (2003).

9. 482 U.S. 78, 89–90 (1987).

10. Owen J. Rarric, Comment, Kirsch v. Wisconsin Department of Corrections*: Will the Supreme Court Say "Hands Off" Again?*, 35 AKRON L. REV. 305, 306 (2002).

11. Adam M. Breault, Note, *"Onan's Transgression": The Continuing Legal Battle Over Prisoners' Procreation Rights*, 66 ALB. L. REV. 289, 291–92 (2002).

adhered to this traditional deferential approach and directed prisons to improve their conditions.[12] It was during this period that rehabilitation as a theory of punishment dominated American penal practices.[13]

The theory of rehabilitation seeks to encourage the criminal to conform to the law and reduce the likelihood of recidivism.[14] Imprisonment could therefore be used to improve inmates, providing them with the chance to gain market skills or treatment for psychological or substance abuse problems.[15] Once an inmate returns to society, rehabilitation allows the former inmate to reintegrate into the community and abide by the laws.[16]

Rehabilitation helped fuel the courts' prisoners' rights jurisprudence.[17] For example, in *Procunier v. Martinez*,[18] the United States Supreme Court found a prison regulation allowing censorship of inmate mail unconstitutional[19] while recognizing a legitimate government interest in rehabilitation.[20] In fact, as late as 1975 the Colorado Supreme Court declared, "Rehabilitation is the best method for preventing crime."[21] Proponents of rehabilitation urged that reintegrating the offender into the community reduced recidivism and should be the primary objective of prisons.[22] In other words, rehabilitation was considered best for the criminal and society

12. Lisa Gizzi, Note, Helling v. McKinney *and Smoking in the Cell Block: Cruel and Unusual Punishment?*, 43 AM. U. L. REV. 1091, 1097–98 (1994) (citing Wolff v. McDonnell, 418 U.S. 539 (1974)).

13. Sigler, *supra* note 8, at 1161; *see also* RICHARD G. SINGER & JOHN Q. LA FOND, CRIMINAL LAW: EXAMPLES AND EXPLANATIONS 23 (2d ed. 2001).

14. Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1316 (2000).

15. *Id.* at 1316–17.

16. Ashley Paige Dugger, Note, *Victim Impact Evidence in Capital Sentencing: A History of Incompatibility*, 23 AM. J. CRIM. L. 375, 402 (1996).

17. *See, e.g.*, *Wolff*, 418 U.S. at 563 (recognizing the "rehabilitative goals" of prisons); Pell v. Procunier, 417 U.S. 817, 823 (1974) (recognizing that a "paramount objective of the corrections systems is the rehabilitation of those committed to its custody."); Procunier v. Martinez, 416 U.S. 396, 413 (1974).

18. 416 U.S. 396 (1974).

19. *Id.* at 417–19.

20. *Id.* at 413.

21. People v. Duran, 533 P.2d 1116, 1119 (Colo. 1975).

22. WAYNE N. WELSH, COUNTIES IN COURT: JAIL OVERCROWDING AND COURT-ORDERED REFORM 27 (1995).

because people believed it effectively reduced the probability of criminals committing crimes again.

B. Disenchantment with Rehabilitation and the Narrowing of Prisoners' Rights

By the late 1970s, the public's acceptance of rehabilitation as a basis for punishment began to wane.[23] Evidence surfaced showing rehabilitation had little effect on recidivism, causing the public to doubt the effectiveness of rehabilitation.[24] Criminal jurisprudence, therefore, shifted to theories of deterrence and retribution because rehabilitation was no longer seen as a viable goal for American prisons.[25] Society believed that "nothing work[ed]" to prevent the criminal from committing future crimes and therefore rehabilitation no longer dominated as an acceptable theory of punishment.[26]

The United States Supreme Court's halt to the expansion of prisoners' rights reflected this shift in attitude.[27] By 1989, the Court ruled that during incarceration, inmates have no constitutional right to unfettered visitation[28] and by 1996, in response to the overwhelming swell of prison populations, Congress enacted the Prison Litigation Reform Act[29] with the purpose of reducing prisoner litigation.[30] The Prison Litigation Reform Act severely restricted the ability of prisoners to file civil actions and restricted the courts in

---

23. *Id.* at 28. This evidence regarding the ineffectiveness of rehabilitation was later withdrawn by its author, Robert Martinson. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 127 (7th ed. 2001). "Nonetheless, the conclusion that 'nothing works' had become fixed in the public mind, and it has proved difficult to dislodge." *Id.*

24. WELSH, *supra* note 22, at 28–29.

25. Consuelo Alden Vasquez, Note, *Prometheus Rebound by the Devolving Standards Of Decency: The Resurrection of the Chain Gang*, 11 ST. JOHN'S J. LEGAL COMMENT. 221, 237 (1995).

26. *See* SINGER & LA FOND, *supra* note 13, at 24; *see also* KADISH & SCHULHOFER, *supra* note 23, at 127–28.

27. *See* WELSH, *supra* note 22, at 26.

28. Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 460 (1989).

29. Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321–66 (1996) (codified as amended in scattered sections of U.S.C. tits. 11, 18, 28, and 42).

30. Ann H. Mathews, Note, *The Inapplicability of the Prison Litigation Reform Act to Prisoner Claims of Excessive Force*, 77 N.Y.U. L. REV. 536, 546–47 (2002).

granting relief in lawsuits brought by prisoners.[31] It was in this climate that the United States Supreme Court decided *Overton v. Bazzetta*.[32]

III. OVERTON V. BAZETTA

A. The Facts

In 1995, the MDOC enacted regulations limiting the visitation rights of inmates in response to an increase in Michigan's prison population during the early 1990s.[33] The MDOC discovered "it [was] more difficult to maintain order during visitation and to prevent smuggling or trafficking in drugs"[34] and was concerned with the increase in visits by children, who risked observing "harmful conduct" during their visits with prisoners.[35]

The MDOC regulations:

> (1) prohibited visits by an inmate's siblings, nieces and nephews;
>
> (2) prohibited visits by an inmate's child if parental rights were terminated;
>
> (3) prohibited visits by former inmates, not including immediate family;
>
> (4) required a parent or legal guardian to accompany all visiting children; and
>
> (5) permanently prohibited visitors, except lawyers and clergy, for an inmate with two substance abuse violations within the prison.[36]

Those prisoners with two substance abuse violations, and thus subject to the fifth restriction, could "apply for reinstatement of visitation privileges after two years. Reinstatement [was] within the warden's discretion."[37]

---

31. Thomas Julian Butler, Comment, *The Prison Litigation Reform Act: A Separation of Powers Dilemma*, 50 ALA. L. REV. 585, 589 (1999).
32. 539 U.S. 126 (2003).
33. *Id.* at 129.
34. *Id.*
35. *Id.*
36. Bazzetta v. McGinnis, 286 F.3d 311, 315 (6th Cir. 2002).
37. *Overton*, 539 U.S. at 130 (citation omitted).

Inmates, their friends, and families brought suit against the MDOC, asserting the regulations, as applied to non-contact visits,[38] violated their First, Eighth, and Fourteenth Amendment rights.[39] The district court, following a bench trial, held the visitation limitations, as applied to non-contact visits, violated the inmates' First Amendment right of intimate association and were not rationally related to a legitimate penological interest.[40] The district court further held that the prohibition against visitation rights for those inmates with two substance abuse violations constituted cruel and unusual punishment, violating the Eighth Amendment and the inmates' due process rights under the Fourteenth Amendment.[41]

On appeal, the Sixth Circuit affirmed the judgment, stating the MDOC did not provide any "convincing justification" for the regulations.[42] The United States Supreme Court granted certiorari and reversed the lower courts.[43]

B. The Reasoning of the United States Supreme Court

In a relatively brief opinion by Justice Kennedy, the United States Supreme Court declared the MDOC's restrictive regulations on prisoner visitation rights constitutional. Conferring "substantial deference" to the prison officials' professional judgment,[44] the Court first applied the four-factor balancing test it set forth in *Turner v. Safley*,[45] which is used to determine whether prison regulations are

38. *Id.*
39. *Id.*
40. *Bazzetta*, 286 F.3d at 316. The Eastern District Court of Michigan "issued two previous decisions, affirmed by the Sixth Circuit Court of Appeals, upholding the restrictions in the context of contact visits. Thus, the only remaining issue . . . [was] whether the restrictions [were] constitutional in the context of non-contact visits." Bazzetta v. McGinnis, 148 F. Supp. 2d 813, 815 (E.D. Mich. 2001). The United States Supreme Court therefore granted certiorari regarding only non-contact visits. *Overton*, 539 U.S. at 130.
41. *Bazzetta*, 286 F.3d at 316.
42. *Id.* at 323.
43. *Overton*, 539 U.S. at 131, 137.
44. *Id.* at 132.
45. 482 U.S. 78 (1987).

reasonable and withstand a constitutional challenge.[46] The factors are as follows:

> (1) A "valid, rational connection" must exist between the regulation and the legitimate government interest put forward to justify it;[47]
>
> (2) consideration of whether "alternative means" of exercising the asserted constitutional right remain open to prisoners;[48]
>
> (3) consideration of the impact that accommodating the asserted right will have on "guards and other inmates, and on the allocation of prison resources generally;"[49] and
>
> (4) consideration of "the absence of ready alternatives" to the regulation.[50]

The Court held the restriction on visitation by children bore a "valid, rational connection" to the legitimate governmental interest "in maintaining internal security and protecting child visitors from exposure to sexual or other misconduct or from accidental injury."[51] The Court further held that the restriction on visitation for inmates with two substance abuse violations bore a "valid, rational connection" to "deterring the use of drugs and alcohol within the prisons" and was a "necessary management technique" to encourage inmate compliance with prison rules.[52]

Having determined the MDOC's regulations bore a valid, rational connection to a legitimate government interest, the Court then found the inmates possessed "alternative means" of exercising their rights, since they could communicate through letter-writing and telephone calls.[53] The Court stressed that "[a]lternatives to visitation need not be ideal, however; they need only be available."[54] Thus, the regulation met the second prong of the *Turner* test.

---

46. *Overton*, 539 U.S. at 132. Courts use the four-factor *Turner* test to determine whether a prison regulation is valid when that regulation also restricts an inmate's constitutional right. *Id.*

47. *Turner*, 482 U.S. at 89.

48. *Id.* at 90.

49. *Id.*

50. *Id.* at 89–90.

51. *Overton*, 539 U.S. at 133.

52. *Id.* at 134.

53. *Id.* at 135.

54. *Id.*

The Court next examined the impact of accommodating the prisoners' rights on guards, other inmates, and the allocation of prison resources. The Court found that accommodating the inmates' requests would have a great impact on the financial resources of prisons and would limit the prison employees' ability to protect the inmates.[55] The Court then noted it would give deference to the MDOC's regulatory judgments in these two areas under the third prong.[56]

Finally, in analyzing the last prong of the *Turner* test, the consideration of the lack of ready alternatives,[57] the Court found that "*Turner* does not impose a least-restrictive-alternative test,"[58] but instead inquires as to whether the inmate has identified an obvious alternative that "fully accommodates" the right while not placing more than a "*de minimis*" cost on the legitimate governmental interest.[59] The Court then found the inmates failed to suggest any ready alternatives that would impose less than a *de minimis* cost on the prison's interest in maintaining security and decreasing drug abuse, finding that none of the inmates' suggested alternatives met the high standards set forth in *Turner*.[60]

After determining the *Turner* factors were satisfied, the Court then held the visitation restriction on prisoners with two or more substance abuse violations did not constitute cruel and unusual punishment under the Eighth Amendment.[61] The Court asserted this regulation was an acceptable condition of imprisonment[62] and "[did not] create inhumane prison conditions, deprive inmates of basic necessities or fail to protect their health or safety. Nor [did] it involve the infliction of pain or injury, or deliberate indifference to the risk that it might occur."[63] The United States Supreme Court therefore found the MDOC regulations constitutional and severely restricted inmate visitation rights.

---

55. *Id.*
56. *Id.* (citing *Turner*, 482 U.S. at 90).
57. *Id.* at 136.
58. *Id.* (citing *Turner*, 482 U.S. at 90–91).
59. *Id.* (citing *Turner*, 482 U.S. at 90–91).
60. *Id.*
61. *Id.* at 136–37.
62. *Id.* at 137 (citing Sandlin v. Conner, 515 U.S. 472, 485 (1995)).
63. *Id.* (citing Rhodes v. Chapman, 452 U.S. 337 (1981); Estelle v. Gamble, 429 U.S. 97 (1976)).

IV. ANALYSIS

A. The Court Erred in Applying the First Turner *Factor Since a "Valid, Rational Connection" Between the Prison Regulation and the Legitimate Governmental Interests Put Forward to Justify It Do Not Exist*

The Supreme Court erred in its application of the *Turner* factors to the MDOC regulations at issue in *Overton*. With regard to the restriction on child visitation, the threshold factor was not met; the regulation bore no "valid, rational connection" to the governmental interest "in maintaining internal security and protecting child visitors from exposure to sexual or other misconduct or from accidental injury"[64] since visits are essential to rehabilitation and non-contact visits do not expose a visiting child to prisoner misconduct.

Furthermore, with regard to the restriction of visitation rights for prisoners with two substance abuse violations, the first *Turner* factor was not met; the regulation bore no "valid, rational connection" to the governmental interest in preventing the smuggling of contraband since the regulation was actually in opposition to this goal.

Both of the regulations at issue dealt exclusively with non-contact visits.[65] The Court reached its conclusion without explaining how non-contact visits could expose a child to prisoner misconduct. In fact, it is hard to imagine a situation where inmates could exchange contraband or a child could be molested during a visit where the visitor is physically separated from the inmate by a glass wall.[66] Specifically, the Federal Bureau of Prisons reported that "*[c]ontact visits* are a [m]ain [c]onduit for [d]rug [s]muggling."[67] In fact, the Federal Bureau of Prisons recommended in its report that in

64. *Id.* at 133.

65. *Id.* at 130; *see also supra* text accompanying note 40.

66. Brief of Amici Curiae Public Defender Service for the District of Columbia et al. at 18, Overton v. Bazzetta, 529 U.S. 126 (2003) (No. 02-94) [hereinafter Public Defenders' Service Brief].

67. U.S. DEP'T OF JUSTICE, REPORT NO. I-2003-002, THE FEDERAL BUREAU OF PRISONS' DRUG INTERDICTION ACTIVITIES, (2003) (emphasis added), *available at* http://www.usdoj.gov/oig/inspection/BOP/03-02/report.pdf.

order to solve the smuggling of drugs, "contact visits should be replaced by non-contact visits,"[68] meaning that even the federal government believes prohibiting non-contact visits does not bear a rational connection to the legitimate interest of drug smuggling.

The Court also failed to take into account the fact that "no evidence was presented to establish that minor children were either involved in or able to see any [sexual] activity"[69] and that the MDOC conceded there had been no incidents of sexual abuse or misconduct occurring during a non-contact visit involving minors since January 1, 1984.[70]

In fact, what prompted "a wholesale review of [the MDOC's] visitation policies" was the sexual assault of a 3-year old in 1994.[71] However, "internal reports suggested that the assault could have been prevented if the department had followed appropriate procedures at the time . . . ."[72] In fact, the molestation took place in a prison that had no facilities for non-contact visits.[73] Furthermore, the prison was aware of the inmate's penchant for molesting young girls and actually permitted the incident to occur.[74] It appears that instead of choosing to correct procedural problems caused by the MDOC's own mismanagement, the MDOC chose to punish its prisoners by restricting their visitation rights.

Furthermore, the visitation ban placed on prisoners with two substance abuse violations is not related to a penological interest since it actually counters the purpose of the restriction. The Court found the purpose of the ban was to "deter[] the use of drugs and alcohol within the prisons."[75] However, at trial, an expert's uncontroverted testimony showed elimination of visitation rights was "counter therapeutic" and actually caused the prisoner to resort to

---

68. *Id.*

69. Bazzetta v. McGinnis, 148 F. Supp. 2d 813, 829 (E.D. Mich. 2001).

70. *Id.*

71. Shepardson, *supra* note 2.

72. *Id.*

73. *Man Molests Child During Prison Visit*, HAMILTON SPECTATOR, May 19, 1994, at A9.

74. *See id.* Michigan police Detective Sergeant Tom Ackley stated, "This should have never happened . . . . You think somebody by now would at least make a decision to prohibit this man's visits." *Inmate Molests Girl in Prison's Visiting Room*, CHI. TRIB., May 19, 1994, at 3.

75. Overton v. Bazzetta, 539 U.S. 126, 134 (2003).

substance abuse.[76] In other words, prohibiting visitation for substance abuse violators would only promote the use of drugs and alcohol within the prison.

Finally, the Court's belief that restrictions on visitation rights were rationally connected to the governmental interest of maintaining internal security is unfounded, especially in light of evidence that "a well-run visiting program increases the security of penal institutions."[77] Prisons with such programs experience a reduction in tensions within the prison.[78] Also, visitation has a positive impact on an inmate's ability to adjust to life in prison.[79] In fact, studies show that improved behavior in prison is directly related to visitation.[80] The United States Supreme Court therefore failed to recognize the positive impact visitation rights have on maintaining a well-run facility and how visitation can be beneficial to both prison guards and inmates.

B. The Court Erred in Applying the Second Turner *Factor Because Alternative Means of Communication Did Not Remain Open to Inmates*

When the Court determined the reasonableness of the regulations by applying the second factor of the *Turner* test—whether "alternative means" of exercising the asserted right existed—the Court held that such alternative means remained open to the prisoners since they could exercise their right to association via telephone calls and letter-writing.[81] The Court found these alternatives were sufficient for all inmates to exercise their right of association even where visitation was completely prohibited.[82] Although the Court acknowledged that telephone calls and letter-writing were not sufficient alternatives for most inmates, the Court further stated that "[a]lternatives to visitation need not be ideal,

76. Bazzetta v. McGinnis, 148 F. Supp. 2d 813, 854 (E.D. Mich. 2001).

77. MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 12:1 (3d ed. 2002) (citing Kozlowski v. Coughlin, 871 F.2d 241, 242–43 (2d Cir. 1989)).

78. *Id.* (citing *Kozlowski*, 871 F.2d at 242–43).

79. MODEL SENTENCING AND CORR. ACT § 4-115 cmt., 10 U.L.A. 470 (2001).

80. Schuelke, *supra* note 7, at 160.

81. Overton v. Bazzetta, 539 U.S. 126, 135 (2003).

82. *Id.*

however; they need only be available" [83] and that these alternatives were sufficient to support the restrictions.[84]

By stating this, the Court appears to completely do away with the second factor of the *Turner* test. The whole point of considering alternatives is to show that prisoners have open to them other means of asserting their rights; if not, then the *Turner* balancing test weighs in favor of finding the regulation unreasonable. If, however, these means are available, but impractical, the second prong of the test is rendered useless.

In *Overton*, the alternatives of telephone calls and letter-writing were impractical. "At trial, unchallenged expert testimony showed that 40 to 80% of inmates are functionally illiterate, unable to compose a letter."[85] Furthermore, visitation is the only way for prisoners to communicate with younger children who have not yet learned to speak or read.[86] Most prisoners, therefore, would not be able to exercise their right to association under the MDOC regulations.

Also, the telephone call alternative is impractical because not only are the calls "brief and expensive,"[87] but they are constantly disrupted with a "message com[ing] over the telephone every few minutes announcing that the call is being monitored."[88] Furthermore, both letter-writing and telephone calls strip the inmate and the visitor of the ability to see each other. If rehabilitation is facilitated by the prisoners' contact with the outside world, the alternative means of asserting the right to association must be effective if the prisoner is to reap any benefits from its use.

---

83. *Id.*
84. *Id.*
85. Bazzetta v. McGinnis, 286 F.3d 311, 319 (6th Cir. 2002).
86. MUSHLIN, *supra* note 77, § 12:2.
87. *Overton*, 539 U.S. at 135.
88. Brief of Amici Curiae American Civil Liberties Union et al. at 16 n.5, Overton v. Bazzetta, 539 U.S. 126 (Feb. 18, 2003) (No. 02-94).

C. *The Court Erred in Applying the Third* Turner *Factor Because Accomodating the Right Would Not Have a Significant Impact on Guards, Prisoners, or the Reallocation of the Prison's Financial Resources*

The third *Turner* factor considers the impact of accommodating the asserted right on guards, other inmates, and the allocation of prison resources.[89] The United States Supreme Court's cursory explanation as to how the regulations in *Overton* met this factor consisted of the statement, "Accommodating [the] respondents' demands would cause a significant reallocation of the prison system's financial resources and would impair the ability of corrections officers to protect all who are inside a prison's walls."[90] This statement, however, is unsubstantiated, tenuous at best, and, at worst, completely disregards the profound impact on the prisoners' quality of life.

As stated earlier, expanding prisoner visitation rights has a positive rather than a negative impact on guards and inmates alike.[91] Furthermore, the MDOC regulations were enacted in response to prison overcrowding and to relieve the strain on the MDOC's resources.[92] In 1999, however, the MDOC reported that its prison population only increased by 1.5%, 2.9% lower than projected.[93] The MDOC credited this reduction in growth to the decrease in the number of parole violators with new sentences and a decrease in the number of parole violators returning to prison.[94] Prisoner visitation may therefore be instrumental to the success of the prisoner on parole, and may lead to a reduction in recidivism rates. Decades of studies support the assertion that prisoner visitation encourages "rehabilitation, reduce[s] behavior problems, and significantly increase[s] a prisoner's chance for success on parole."[95] The MDOC's regulations ignore this body of evidence and set the system up for a vicious cycle of recidivism and overcrowding.

---

89. Turner v. Safley, 482 U.S. 78, 90 (1987).
90. *Overton*, 539 U.S. at 135.
91. *See supra* Part IV.A.
92. *Overton*, 539 U.S. at 129.
93. MICH. DEP'T. OF CORR., 1999 ANNUAL REPORT 41 (1999), *available at* http://www.michigan.gov/documents/1999annual_2148_7.pdf.
94. *Id.* at 42.
95. MUSHLIN, *supra* note 77, § 12:1 (quoting Bazetta v. McGinnis, 286 F.3d 311 (6th Cir. 2002)).

If visitation leads to successful parolees and reduced recidivism rates, which in turn lead to a decrease in the overall prison population, prison resources will become less strained as result of visitation. Restricting visitation rights may cause the reverse, resulting in an even greater strain on prison resources. Therefore, the MDOC regulations may actually be perpetuating the need for the prison to reallocate a significant amount of its financial resources in response to the growth in the prison population. The Court's focus on the facial rationales for the regulations fails to recognize the underlying principles it seeks to prevent and protect. Accommodating the Respondents' demands in *Overton* would not cause a significant reallocation of the MDOC's financial resources because in the end, expanded prisoner visitation rights may lead to a decrease in the prison population, freeing-up financial resources rather than straining them.

D. The Court Erred in Applying the Fourth Turner *Factor Because the Inmates Suggested Alternatives that Would Have No More than a* De Minimis *Cost to the MDOC's Penological Interests*

The final factor in assessing the reasonableness of prison regulations is "the absence of ready alternatives."[96] The *Overton* Court recognized that the existence of such ready alternatives may be an indication that the regulations are an "'exaggerated response' to prison concerns."[97] The Court further pronounced, "*Turner* does not impose a least-restrictive-alternative test," but instead requires the prisoner to suggest an obvious alternative that completely accommodates the inmate's right, and that does not impose more than a "*de minimis* cost" upon the legitimate governmental interest.[98] The Court concluded that the Respondents failed to make such a showing in this case.[99]

The Court erred in its judgment for the following reasons: first, the Respondents suggested that "allowing visitation by nieces and nephews or children for whom parental rights have been terminated

96. Turner v. Safley, 482 U.S. 78, 89–90 (1987).
97. *Id.* at 90.
98. Overton v. Bazzetta, 539 U.S. 126, 136 (2003) (citing *Turner*, 482 U.S. at 90–91).
99. *Id.*

[was] an obvious alternative."[100] Such an alternative would not, as the Court determined, result in more than a *de minimis* cost to the MDOC's penological goals. In fact, the goal of reducing the number of visitors could still easily be met if the MDOC allowed these children to visit prisoners.

To illustrate, the Sixth Circuit duly noted that the MDOC hoped the regulations would decrease visits by 10–15%, "at which point they apparently believed visits would again be manageable."[101] Once the regulations were enacted, however, the MDOC's figures showed that visits fell by 50%.[102] In other words, these regulations were not expected to cause the drastic drop in visits that actually occurred. "In light of these facts, the regulations appear as attempts not to manage visits but to end them."[103] The goal of the regulations was to *reduce* the number of visitors, not to completely cut-off prisoners from all visitors.

In fact, taking the above statistics into account, the regulation seems to be an "exaggerated response" to these penological goals. In fact, the alternative the Respondents suggested better fits these goals than the regulation the MDOC actually enacted, since the enacted regulation decreased visits far beyond what the MDOC expected. Permitting nieces, nephews, and children whose parental rights have been terminated to visit inmates would more closely meet the expected decrease in visitors of 10–15%; therefore, this alternative would not impose more than a *de minimis* cost upon the valid penological goal of maintaining internal security and protecting children from misconduct. It would more closely meet the MDOC's expected decrease.

The Respondents also suggested the permanent ban on visits for prisoners with two or more substance abuse violations could be reduced or the permanent ban could be imposed only for the most serious violations.[104] The Court rejected these alternatives, stating they did not accommodate the right to association at a *de minimis*

100. *Id.*
101. Bazzetta v. McGinnis, 286 F.3d 311, 318 (6th Cir. 2002).
102. *Id.* (citing Bazzetta v. McGinnis, 148 F. Supp. 2d 813, 820–21 (E.D. Mich. 2001)).
103. *Id.*
104. *Overton*, 539 U.S. at 136.

cost to the penological goals of the prison.[105] The Court found the substance abuse regulation supposedly furthered the penological goal of "deterring the use of drugs and alcohol within the prisons."[106] However, the Respondents' suggested alternative more closely relates to that penological goal than the actual regulation, especially since the regulation was used to punish prisoners rather than to prevent the use of drugs.

As the Sixth Circuit acknowledged, the MDOC "has imposed visitation bans capriciously and according to no reviewable standards."[107] In fact, the permanent ban was placed on "only 41% of prisoners with two violations"[108] between 1995 and 2000, yet was sometimes placed on inmates "for what [was] effectively a single drug infraction."[109] Far from being used for the purpose of preventing drug smuggling, the MDOC has instead used the substance abuse restriction as an arbitrary punishment.

Even more troubling is the fact that the substance abuse regulation is a "permanent ban [on visitation] that *may be* removed after two years."[110] Even the Court recognized that "the restriction is severe. And if faced with evidence that MDOC's regulation is treated as a *de facto* permanent ban on all visitation for certain inmates, we might reach a different conclusion . . . ."[111] The regulation, however, clearly contemplates a permanent ban on visitation for those inmates with two substance abuse violations.[112] The Respondents' alternative of shortening the period of the restriction or applying the restriction only for the most serious violations would reduce the

---

105. *Id.*
106. *Id.* at 134.
107. Bazzetta v. McGinnis, 286 F.3d 311, 321 (6th Cir. 2002).
108. *Id.*
109. *Id.* at 322.

> One inmate received a permanent ban after being found in possession of marijuana (violation #1) and then testing positive for the drug 75 minutes later (violation #2); another received a permanent ban after throwing a packet of marijuana on the ground (violation #1) then being found with another on his person during the ensuing search (violation #2).

Id. (citing Bazzetta v. McGinnis, 148 F. Supp. 2d. 813, 838 n.39 (E.D. Mich. 2001)).
110. *Id.* (emphasis added).
111. *Overton*, 539 U.S. at 134.
112. *See id.* at 130.

arbitrary and capricious manner in which the regulation had been carried out. "One need hardly be cynical about prison administrators to recognize that the distinct possibility of retaliatory or otherwise groundless deprivations of visits calls for a modicum of procedural protections to guard against such behavior."[113] It would also better serve the penological goal of reducing drug use if the restriction was not a permanent ban that could only be removed at the discretion of the prison official,[114] but a two year ban that could be reinstated if another substance abuse violation occurred. Such an alternative would not impose more than a *de minimis* cost upon the valid penological goal of preventing drug use.

V. IMPLICATIONS

The *Turner* test and its application to prison regulations should be revised to fully take into account all of the penological goals of prisons. The *Overton* holding recognizes a valid interest in maintaining the internal security of prisons, but it is carried out at the expense of the goal of rehabilitation. A more accurate test would be to balance the legitimate prison interests rather than allowing the prison to point to just one interest.

The *Overton* holding directly cuts against the penological interest of rehabilitation, which was specifically identified as such by the United States Supreme Court in *Procunier v. Martinez*.[115] In fact, in 2002, the United States Supreme Court recognized that "[s]ince 'most offenders will eventually return to society, [a] paramount objective of the corrections system is the rehabilitation of those committed to its custody.'"[116]

However, Justice Thomas' concurrence in *Overton* appears to discount the Court's prior holdings. He outlines a brief history of prisons and goes so far as to state that prisoner visitation rights were used to punish, rather than benefit, the inmate.[117] This view, however, is not widely accepted, especially with regard to visitation

113. Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 470 (1989) (Marshall, J., dissenting).

114. *Bazzetta*, 286 F.3d at 322.

115. 416 U.S. 396, 404, 412 (1973).

116. McKune v. Lile, 536 U.S. 24, 36 (2002) (quoting Pell v. Procunier, 417 U.S. 817, 823 (1974)).

117. *Overton*, 539 U.S. at 144 (Thomas, J., concurring).

by children.[118] Justice Thomas' rendition of the history of prisons suggests that America has a tradition of restricting prisoners' visitation rights, but the facts point to the contrary. For example, as early as 1849, the state of Pennsylvania "urged that prisoners be allowed to receive letters and visits from relatives, in order to reduce the deleterious effects of solitary confinement."[119] In other words, Thomas appears to go through a revisionist history regarding the importance of visitation rights and their beneficial effects on prisoners.

The Court should continue to recognize rehabilitation as a legitimate penological interest that cannot be overruled simply because another interest exists. Visitation rights are necessary to the prisoner because "[n]o single factor has been proven to be more directly correlated with the objective of a crime-free return to society than visiting."[120] In fact, rules restricting prisoner visitation rights do not contribute to an inmate's progress.[121] "Indeed, they may be counterproductive, causing prisoners to feel hostile, bitter, and estranged from their families."[122] By restricting a prisoner's visitation rights, especially by completely barring an inmate from even non-contact visits, the United States Supreme Court has undermined the very penological interest it set out to protect when it established the *Turner* test.

Rehabilitation becomes especially important in light of the number of prisoners released on parole. For example, in 2001, "[a]bout 600,000 individuals—roughly 1,600 a day—[were] released from state and federal prisons . . . to return to their communities."[123] The increase in the prison population has a direct relation to the

118. *See* JAMES J. GOBERT & NEIL P. COHEN, RIGHTS OF PRISONERS 130 (1981).

119. Public Defenders Service Brief, *supra* note 66, at 16–17.

120. MUSHLIN, *supra* note 77, § 12:1 (citing Kozlowski v. Coughlin, 871 F.2d 241, 242 (2d Cir. 1989) ("[I]t has been empirically established that [visiting] is a prerequisite to successful parole"); STANDARDS FOR CRIMINAL JUSTICE, standard 23.6.2, cmt. 23–82 (1986) ("Because almost all inmates ultimately will be returned to the community at the expiration of their terms, it is important to preserve, wherever possible, family and community ties.").

121. GOBERT & COHEN, *supra* note 118, at 132.

122. *Id.*

123. JEREMY TRAVIS ET AL., THE URBAN INST. JUSTICE POLICY CTR., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 1 (2001).

number of prisoners paroled: the more people who are incarcerated, the more who will be ultimately released into the community.[124] Prisoner visitation rights facilitate successful parole because generally, inmates who retain relationships with their family while incarcerated will be more successful once released than those who fail to maintain such relationships.[125] The importance of rehabilitation, therefore, should not be discounted simply because the prison has additional concerns such as internal security, which can be addressed without hampering rehabilitation efforts.

In fact, "[u]ntil 1995, the [MDOC's] own guidelines said visitation was an essential part of rehabilitation."[126] It appears that the MDOC's guidelines were changed because it did not want to deal with the extra visitors resulting from the prison overcrowding that had prompted the enactment of the regulations in the first place. The Court should not allow a prison to deprive its inmates of their rights because the prison identifies only one penological goal at the expense of other legitimate interests. Such a holding allows prisons to be reticent and take the "easy way out" when they do not want to make the extra effort to accommodate a prisoner's rights. The *Turner* test should be amended so that all penological goals, including rehabilitation, are taken into account and balanced to ensure that prison officials do not shirk their responsibility in furthering one of the most important goals of prisons: rehabilitation.

VI. CONCLUSION

The United States Supreme Court has followed a trend of limiting prisoners' rights, and its ruling in *Overton* is no exception. The problem, however, is that in limiting prisoners' rights, the Court undermines the very principles the MDOC set out to protect, namely, reducing recidivism, protecting children, and decreasing the prison population. The only way these goals can remain intact is through the rehabilitation of the prisoner.

Studies show that "[p]risoners who maintain continuous, quality contact with three people while they are incarcerated . . . are only one-sixth as likely as others to be back in prison a year after their

124. *Id.* at 4.
125. *Id.* at 39.
126. Shepardson, *supra* note 2.

release."[127] For a child, visiting a parent or relative in prison may be a difficult experience, but not seeing them at all may be worse. "The child is effectively cut off from personal contact with the parent, producing a situation unlikely to foster strong parent-child ties."[128] This reasoning is also true for those prisoners who act as parents to children outside of the strictly biological parenting paradigm. This is especially true in light of the 1999 National Survey of America's Families finding that 2.3 million children lived with non-parent relatives in 1999.[129]

In the wake of the Sixth Circuit's ruling in *Bazzetta v. McGinnis*, the MDOC revised its visitation rules so that minor siblings could visit inmates, minor nieces and nephews could have non-contact visits with inmates, and the restrictions regarding drug-offenders were changed so that inmates who committed one violation were restricted to non-contact visits.[130] Following the Supreme Court's ruling, however, the MDOC will more than likely reinstate the original regulations.[131] This would certainly be an unfortunate end to the *Overton* battle. The expansion of prisoners' rights and the theory of rehabilitation should not be forgotten in today's rush to build more prisons.

Stacy Barker will be eligible for parole in 2008.[132] She will return to her daughter when she is paroled, and that daughter may be the reason why Barker will never return to prison again. The stronger Barker's ties to her daughter, the more difficult it will be for her to commit a crime knowing she will return to prison.

---

127. Joanne Mariner, *Rhenquist Family Values: The Supreme Court's Misguided Decision in* Overton v. Bazzetta, *at* http://writ.news.findlaw.com/mariner/20030624.html (June 24, 2003).

128. GOBERT & COHEN, *supra* note 118, at 132.

129. AMY JANTZ ET AL., THE CONTINUING EVOLUTION OF STATE KINSHIP CARE POLICIES 1 (2002), *available at* http://www.urban.org/UploadedPDF/310597_state_kinship_care.pdf.

130. *Supreme Court: Michigan Prison Visitation Rules Upheld*, FACTS ON FILE WORLD NEWS DIG., June 16, 2003, at 494G2, LEXIS: News & Business/News/News.All.

131. *See Visitation Restrictions Upheld in Mich.*, CORRECTIONS TODAY, Aug. 1, 2003, 2003 WL 14014485.

132. Jennifer Chambers, *Plea Bargain Gives Closure to Victim's Grieving Family*, DETROIT NEWS, Dec. 6, 2001, *available at* http://www.detnews.com/2001/oakland/0112/09/d04-360099.htm. Barker will be eligible for parole in 2008 due to a plea bargain that was struck after her murder conviction was overturned on appeal. *Id.*

If one takes time to step back and look carefully at the principles underlying prison overcrowding and how this problem can be solved through prison visitation, the results might be startlingly different from the decision the United States Supreme Court rendered in *Overton v. Bazzetta*.

Marsha M. Yasuda[*]

[*] J.D. Candidate, May 2005, Loyola Law School, Los Angeles. The author would like to thank Professor Gary Williams for his guidance and her parents, grandmother, and sister for their love and support.